

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-2006

ORIG. FOR CT.
WITH
AFFID. OF
SERVICE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 75-2006

B
P/S

UNITED STATES OF AMERICA ex rel.
JULIUS FULLER,

Petitioner-Appellant,

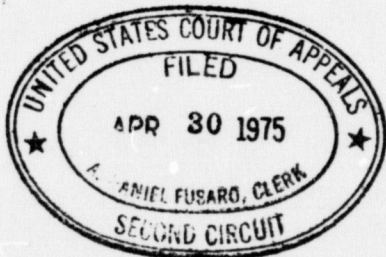
- against -

HONORABLE ROBERT J. HENDERSON,
Superintendent,

Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

SUBSTITUTED BRIEF FOR APPELLANT



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75-2006

UNITED STATES OF AMERICA ex rel.
JULIUS FULLER,

Relator-Appellant,

-against-

ROBERT HENDERSON, SUPERINTENDENT,

Respondent.

On Appeal from the United States District Court
for the Southern District of New York

SUBSTITUTED BRIEF FOR APPELLANT

The Issues Presented for Review

1. Whether Fuller's confession was voluntary, it having been wrong from him by the arresting officers and the prosecutor while he was held incommunicado after continuous interrogation of him for more than eight hours?
2. Whether the admission at the trial of testimony revealing Fuller's involuntary confession was a violation of

his constitutional rights?

3. Whether the failure of Fuller's trial counsel to object to the introduction at the trial of Fuller's confession or to move to try its voluntariness was a waiver of Fuller's constitutional rights?

4. Whether Fuller's Petition for a Writ of Habeas Corpus should have been denied by the District Court without a hearing and without the appointment of counsel to represent the Petitioner, who is indigent and incapable of representing himself and has a meritorious constitutional claim?

Statement of the Case

This is an appeal from a ruling of the District Court for the Southern District of New York (Cannella, J.) denying without a hearing a Petition made March 6, 1973 for a Writ of Habeas Corpus (A 3).^{*} Julius Fuller, the Petitioner, pro se, claims that his conviction of manslaughter in the first degree in Bronx County Supreme Court and his sentence and detention were in violation of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Fuller appears to have

^{*} References preceded by the letter "A" are to the Appendix to this Brief.

made the contentions, among others, in his confused and inartfully drawn Petition, that was prepared without assistance of counsel, that his involuntary confession was unlawfully introduced at the trial in violation of his constitutional rights (A 12) and that he was denied effective assistance of counsel (A 10).*

Judge Cannella did not direct a hearing or appoint counsel to represent Fuller and summarily denied the Petition in an opinion rendered on July 12, 1973 (A 3). It does not appear that Judge Cannella reviewed the trial transcript. The ground for the decision was that the arguments raised had been rejected on Fuller's prior application for a Writ of Habeas Corpus in the District Court (A 4). Judge Cannella relied in his July 12, 1973 opinion on his own prior decision made May 16, 1972 in which he had denied Fuller's prior petition also without a hearing or appointing counsel (A 4, 21). The first decision was based on the transcript of a State Habeas Corpus hearing which Fuller had instituted and tried without the assistance of counsel (A 21). The voluntariness of Fuller's confession was not tried in the State hearing. The

* Fuller's other contentions are not pursued on this appeal.

District Court, in the July 12, 1973 opinion and the May 16, 1972 opinion, did not consider the lawfulness of the use of Fuller's confession on the trial or whether it was voluntarily made.

The Constitutional Provisions Involved

The Fifth Amendment to the Constitution of the United States:

. . . nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty without due process of law; . . .

The Sixth Amendment to the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States:

1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Facts of the Case

The Petitioner, Julius Fuller, was convicted in August 1956, after a third trial in Bronx County Supreme Court, of the crime of manslaughter in the first degree. The verdict was rendered by a jury of twelve (T 606).^{*} Fuller unsuccessfully appealed his conviction to the highest State Court (see People v. Fuller, 9 A.D.2d 877, aff'd 8 N.Y.2d 866) and thus exhausted his available State remedies.

The first trial held in April 1954 resulted in a disagreement. The jury were polled and reported their position as eleven-to-one for acquittal (A 27, People v. Fuller, 9 A.D.2d 877, fn.at p.877). The second trial, held in May 1956, also resulted in a disagreement of the jury, the jurors having indicated that nine voted for acquittal (A 28; People v. Fuller, 9 A.D.2d 877, fn.at p. 877).

Although Fuller did not have a prior felony conviction, he was sentenced in December 1956 at the age of 33 to the maximum sentence, an indeterminate term of 10 to 20 years at hard labor in State prison (A 58). Fuller,

^{*} References preceded by the letter "T" are to the original trial transcript which will be available to the Court on the hearing of this appeal.

now 52 years old, is still serving his sentence at Auburn Correctional Facility.*

As shall appear, Fuller was convicted on his third trial only because of the introduction in evidence of an illegally obtained confession to the crime.

On December 26, 1953, Fuller, Allen Lewis and Ruth Baker were at a bar in the Bronx with Elise Johnson and her husband, Creed Johnson. Elise Johnson, after her husband left for work as a bartender, invited the other three to continue post-Christmas celebrations at her apartment (T 208). After spending about a half-hour as Ms. Johnson's home, all three visitors prepared to leave (T 213-215). It was then about nine in the evening. Ruth Baker testified that as the three went out the door, Ms. Johnson asked Fuller to remain (T 269-274). Fuller asked Ms. Baker and Mr. Lewis to wait for him downstairs but they did not wait (T 216).

At about 5 a.m. on December 27, 1953, Creed Johnson returned home. He found the door unlocked and saw the body

* Fuller is concurrently serving a sentence for a second crime committed while on parole from the sentence on the conviction under consideration on this appeal. The sentence Fuller received on the second conviction was as a second felony offender because of the existence of the felony conviction challenged on this appeal.

of his wife on the floor of the apartment near the door. Her head was badly injured and an iron bar, part of the police lock of the Johnson apartment door, was placed across her body (A 28). Her girdle or garter belt and stockings were next to her legs (A 29). Creed Johnson called an ambulance and the police (T 418-422). Elise Johnson was pronounced dead. An autopsy was later performed (A29). The examiner was unable precisely to fix the time of death but the examiner concluded the cause of death was the wound to the head and that it had been caused by a blow with the iron bar (A 37-40, 57, 59-60; 35).

On December 28, 1953 at about noon, Fuller was apprehended outside his home by several detectives (T 321-323). At the time of his arrest there was no evidence to connect Fuller with the crime other than his presence in the Johnson apartment eight hours before Mrs. Johnson's body was found. After permitting Fuller a brief word with his wife, the detectives took Fuller to the police station (T 323).

Fuller was questioned continuously at the police station by relays of police officers and eventually the prosecutor. The questioning began at about 12:30 p.m. and lasted until 9 p.m. on December 28, 1953 after which he made a confession (T 288-294; 324-328; 549, 551, 552, 553).

According to Fuller, the coercion applied to extract his confession was harsher than appears on the record. Fuller's inability properly to present his claims without the aid of counsel is likely responsible for his failure in the prior habeas corpus proceedings and in the District Court below clearly to plead or fully to explain or relate the circumstances of his confession. In the course of preparing the present brief for Appellant, assigned counsel wrote to Fuller and on April 9, 1975 received the following letter from him (slightly edited to correct grammar, punctuation and spelling):

"At about 1:30 p.m. on December 28, 1953 I was taken from my home by approximately a dozen detectives, after searching my apartment, to the police station, upstairs, to a squad room. [I was] ordered to undress completely. [I was] relieved of all personal effects. [I was] questioned, punched and beaten. This was repeated by different groups of officers: one, six or a dozen. [I had] no water [or] food. I wasn't allowed to use the bathroom.

"I was dressed in some old clothes and put in a line-up with 8 or 10 detectives, all white. I was allowed to use the rest room for the first time.

"Back in the squad room I was told that my wife was locked up down stairs for her part in the crime; that she had told them this. [They said] I could save her by telling them what they wanted to know. ...

"A.D.A. Blatt [the prosecutor] arrived [to take] a statement. I was brought into a different room [and] sat in a chair 2 or 3 feet from the D.A. The room filled up with Detectives. Mr. Blatt asked questions from a paper he had. Different Detectives [wrote] on a piece of paper

[and] passed the paper to Mr. Blatt, saying 'Ask him this.' Mr. Blatt would read from that paper. This went on for some time. I said something like 'Haven't you got enough?' I was later taken downstairs and booked."

Petitioner's assigned counsel on this appeal also conferred with Fuller's trial counsel, Herbert Siegel, regarding the admission of the confession. Mr. Siegel indicated that he had not objected to the admission of the confession because he believed that at the time of the trial, 1956, confessions were generally admissible unless extreme physical force had been used. Mr. Siegel's belief, which as shall hereafter be shown was a misconception of the state of the law at the time of the trial, apparently stood in the way of his making any serious effort to learn the circumstances surrounding Fuller's confession or to object to its introduction at trial.

At the trial, the prosecution introduced ample evidence in direct testimony of the arresting officers of the involuntariness of Fuller's confession. Detective Larry Squires testified for the prosecution (T 324-328; 378):

- Q. What did you say to the defendant and what did he say to you at 12:30 noon [on December 28, 1953]?
- A. I asked the defendant if he had been at the 845 Club with the deceased or had he been up to her home, and he denied being at the 845 Club and he denied being with the deceased

- Q. Did he say whether or not he had seen [Elise Johnson] on the 26th at all?
- A. No; he said he didn't....
- Q. How long did you question him [Fuller] at that particular time?
- A. Well, I questioned him till about six o'clock.
- Q. From 12:30 to six?
- A. That's right.
- Q. And at any time from 12:30 to six did this defendant ever tell you, ... that he had seen Elise Johnson on the 26th of December?
- A. No ...
- Q. What happened then?
- A. Then I retired to the dormitory, and at about 8:30, a quarter to nine, one of the detectives woke me up and told me that I was wanted in the squad room.
- Q. Did you go back to the squad room?
- A. Yes I did.
- Q. Who was in the squad room when you came down?
- A. There were several detectives; Detective Cleary.
- Q. Was Detective Cleary with the defendant?
- A. Yes.
- Q. Did you then have a conversation with the defendant at 8:30?
- A. I did ...
- Q. Where did you have this conversation?

A. In the squad room.

Q. What did you say to the defendant and what did he say to you?

A. Well, I questioned the defendant relative to the deceased and he [confessed] ...

Q. Did you subsequently call for an assistant district attorney and a stenographer to take a statement?

A. I did.

Q. Was a statement taken in your presence?

A. Yes, it was.

* * *

Q. . . . by the way, he [Fuller] didn't have a lawyer with him at the time, did he?

A. No.

The testimony of Detective Cleary supports Detective Squires' testimony that many detectives questioned Fuller at once and in relays continuously through the afternoon and evening of December 28, 1953 until 8:30 to 9:00 p.m. (T 288-290, 293-294). Detective Cleary testified that after Detective Squires had retired for a nap, he continued to question Fuller (T 390):

Q. Did you have any further conversation with him [Fuller]?

A. We spoke to him about an hour. I was talking to him in the office and he didn't want to make any statement to me

Detective Cleary also testified that throughout the interrogation and when Fuller confessed, he was without counsel:

Q. At that time [during the questioning] he had no lawyer, is that right?

A. No, not to my knowledge.

Q. He was in custody at that time, isn't that right?

A. That is right. (T 300-301).

As the fruit of the illegal interrogation, the detectives also learned from Fuller that he had on December 27, 1953 sent the clothes he had worn on December 26 to a cleaner (T 288-289). Detective Cleary found the clothes and a jacket and Fuller identified them as his own (T289, 305). The pants and jacket were stained with semen and blood. (T 192-194).

Fuller's final confession was made to District Attorney Blatt, the prosecutor at the trial, in the presence of several police officers (T 483-484). The statement was dictated to a stenographer, Israels.

The confession Fuller made to the police officers and Blatt as a result of the interrogation, the clothes found as the fruit of the interrogation and the statement dictated by Blatt to Israels (the stenographer) were all admitted into evidence at the trial (T 326-328; 290-294; 483-494). The prosecutor, Mr. Blatt, in his summation, dwelled on the significance of Fuller's confession (T 549-553). The jury requested a re-reading of Israels' testimony during the

course of their deliberations and rendered their verdict of guilty shortly thereafter (T 605-606). Fuller's damaging confession made under duress and the fruits of the confession (his blood-stained clothes) were the only evidence connecting Fuller with the crime. No attempt was made at the trial to test the voluntariness of the confession.

After his trial, conviction and sentencing to a term of 10 to 20 years and his unsuccessful appeals from the conviction Fuller petitioned for Habeas Corpus relief in the State court (A 26). A hearing was ordered. Fuller wrote a letter to the hearing judge, Hon. Gerald S. Hewitt, requesting that counsel be assigned to represent him (A 26A). The request was not granted. Fuller did not introduce evidence of the circumstances of his confession and during the course of the hearing, Fuller repeatedly referred to his incompetence to represent himself. Fuller was first examined by the Court and then insistently cross-examined by Assistant Attorney General Elder without any intervention by the Court. Then the Court addressed Fuller:

COURT: Have you anything more you would like to put in?

A. (Fuller) Yes sir, I don't have the notes--my mind is drained. The questions Mr. Elder has asked here--I am not skilled in examining witnesses and the reasons for certain questions. You gave me the impression you wanted just the truth of this matter. As to the testimony, I don't know how to cross-examine.

COURT: Is there anything else you want to say?

A. Yes sir. I wrote and got a copy of the indictment with endorsements-- it don't make to much sense to me (A 42).

District Attorney Blatt testified for the Respondent. Then the Court asked Fuller to cross-examine (A 47):

COURT: You may cross-examine Mr. Blatt.

FULLER: I don't know if I can cross-examine.

Fuller attempted cross-examination but soon admitted to the Court (A 49):

Q. I don't know how to cross-examine the witness. I am sure your Honor knows the law on this. I am lost. I can't cross-examine Mr. Blatt.

When Mr. Elder examined Mr. Blatt, the State hearing judge permitted Mr. Elder to lead the witness, and permitted Mr. Blatt to testify to hearsay and to indulge in speculation. Judge Hewitt allowed Mr. Blatt to testify to what Fuller's trial counsel had said to him on October 21, 1954, many years before the hearing (A 45), and in 1956 (A 53), on the Thursday or Friday prior to the hearing (A 45); and to what a court reporter had told him prior to his (Blatt's) being summoned to testify at the hearing (A 50). Fuller did not make any objection to the inadmissible testimony because he hadn't the knowledge to do so. Judge Hewitt did not help him.

Judge Hewitt's denial of the writ was based entirely on Mr. Blatt's direct testimony (A 56). Fuller's appeal from the order was unsuccessful. In the first Federal Habeas Corpus proceeding Judge Cannella denied the Writ without a hearing in reliance on the findings in the State hearing (A 21). In the second federal proceeding in which the order on appeal was made, Judge Cannella denied Fuller's Petition, again without holding a hearing in reliance on his own prior opinion in which he had in turn relied on the finding at the State habeas corpus hearing (A 4, 21).

As shall be shown, the facts revealed in the transcript of Fuller's trial and at the State habeas corpus hearing are sufficient to establish Fuller's claim, not considered before by any court, that his confession was involuntary and that his conviction, based almost exclusively on the illegally obtained confession and its fruits, violated Fuller's fundamental constitutional rights. Fuller's Petition should therefore be granted and Fuller released from custody. At the very least, however, if the Court does not agree that the record adequately supports the claim, a hearing on Fuller's Fifth and Fourteenth Amendment claims should be held in the District Court and counsel appointed to represent Fuller so that the circumstances of the confession may be fully explored.

POINT I

FULLER'S PETITION FOR A WRIT
OF HABEAS CORPUS SHOULD BE
GRANTED AND FULLER DISCHARGED
FROM CONVICTION

- A. The Record Shows that Fuller's
Conviction Was Procured by the
Introduction in Evidence of Fuller's
Involuntary Confession Extracted
from Him By the Arresting Officers
and Prosecutor After Eight Hours
of Interrogation Incommunicado

Fuller's confession should not have been admitted in evidence at the trial for it was not voluntarily made but wrung from him against his will as a result of the coercion applied by the arresting officers and the prosecuting attorney. The trial record shows through the testimony of the police officers themselves that Fuller was intensively interrogated continuously from 12:30 in the afternoon to after 9 p.m. on December 28, 1953 by groups of officers working in relays. Fuller resisted the officer's pressures until about 8:30 p.m. when his will was finally overborne. At that moment the prosecuting attorney was called in to join the interrogating officers and Fuller's confession was taken and recorded by a police stenographer. The questioning was so intense that Detective Larry Squires testified to his own need to retire for a nap at about 6:30 p.m. after interrogating Fuller with other policemen from 12:30 in the afternoon. Detective Cleary testified that Fuller's resistance was broken sometime after Squires retired and at 8:30 p.m. Squires was called in to rejoin the group to aid in

the final questioning of Fuller undertaken by the prosecuting attorney Blatt.

During the questioning Fuller was held virtually incommunicado at the police station. He was not permitted to call his wife until he finally began to confess (T.290, 299-300). He was not permitted to call a lawyer at any time. Immediately after his confession he was arraigned and allowed to go free on bail.

The confession was admitted in evidence through the testimony of Detectives Squires and Cleary and the reporter Israels who read his stenographic notes into the record. There was no attempt to test the voluntariness of the confession and neither the jury nor the Court passed on the point, although it was the practice at the time for the question to be submitted to the jury along with the issue of guilt or innocence. Cf. Jackson v. Denno, 378 U.S. 368, in which the practice (approved in Stein v. New York, 346 U.S. 156) was held unconstitutional. The jury were obviously impressed by the confession, for during their deliberations they asked to have Israels' testimony re-read and shortly thereafter delivered the guilty verdict.

The trial record alone, without the need of any additional testimony from Fuller as to the circumstances of the confession is adequate to support Fuller's claim that the confession was illegally obtained and improperly introduced at the trial in violation of Fuller's Fifth and Fourteenth Amendment

rights. Fuller's petition should be granted and his conviction reversed. Leyra v. Denno, 347 U.S. 556; Watts v. Indiana, 338 U.S. 49; Ashcraft v. Tennessee, 322 U.S. 143, Chambers v. Florida, 309 U.S. 227; United States v. Murphy, 222 F.2d 698 (2d Cir.)*

At the time of the trial, the law was clear that a conviction based on confession compelled by psychological pressure alone (without brutality, violence or deceit) was a denial of procedural due process of law to the Defendant. See Watts v. Indiana, 338 U.S. 49; Chambers v. Florida, 309 U.S. 227; and United States v. Murphy, 222 F.2d 698 (2d Cir.) and cases reviewed therein.

In Chambers v. Florida, 309 U.S. 227, an appeal from a conviction of murder, the four defendants had been questioned separately by four to ten officers working together during several days of the week following the crime. The questioning took place in jail where the suspects were held incommunicado. After the first suspect finally "broke" the others confessed too. The prosecutor who eventually tried the case was called to the jail house to take the suspects' statements. The statements were placed in evidence on the trial.

* It appears moreover from Fuller's written statement to assigned appellate counsel on this appeal that his testimony (not now available in any record before the Court) would add to the convincing picture of coercion, touches of violence and deceit. (See pp. 8-9 of this Brief.)

The Court held the convictions were obtained and used in violation of the defendants' Fourteenth Amendment rights to procedural due process of law. The conviction was reversed. The basis of the reversal was a reaffirmation of the fundamental principle that the power of government must not be used to overwhelm the will of helpless individuals; for the Constitution protects the accused from compulsion to himself produce evidence that will convict him. "The determination to preserve an accused's right to procedural due process," the Court wrote, "sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes." 309 U.S. at 237.

Thus the central issue became whether the confession was voluntarily given or was coerced by any means, whether psychological or physical, applied by agents of the government. In Chambers, the Court found the confessions the involuntary result of the prolonged questioning even though no actual brutality was shown. In Watts v. Indiana, 338 U.S. 49, the Court reversed a conviction that, it found, was based on a confession coerced through relentless interrogation. The Court held (338 U.S. at 53):

"A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental

ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary."

In United States v. Murphy, 222 F.2d 698 (2d Cir.. Frank, J.), a petition for a Writ of Habeas Corpus, the Court reversed a decision denying the petition. The ground of the petition was the admission into evidence of the defendant's illegally obtained confession. The record shows that the confession was obtained by the police who held the defendant incommunicado and interrogated him continuously for more than a day until he confessed. The Court held that the prolonged interrogation of the defendant with the purpose of undermining his will to remain silent and the admission in evidence of the confession extracted by such means was a denial of due process of law guaranteed by the Fourteenth Amendment. A review of the law satisfied the Court that it was not necessary to show the defendant was subjected to physical brutality to elicit a confession in order to establish that the confession was involuntary and therefore inadmissible.

"For psychological torture may be far more cruel, far more symptomatic of sadism. Many a man who can endure beatings will yield to fatigue. To keep a man awake beyond the point of exhaustion, while pummelling him with questions, is to degrade him, to strip him of human dignity, to deprive him of the will to resist, to make him a pitiable creature mastered by the single desire -- at all costs to be free of torment." (222 F.2d at 701.)

In Leyra v. Denno, 347 U.S. 556, the Court granted a Writ of Habeas Corpus and discharged a conviction that was procured by the use of the accused's confession extracted after long periods of questioning over a three-day period. The accused, who was suspected of the murder of his parents, was interrogated by a psychiatrist while being held incommunicado. Once the defendant's resistance was broken, the police and prosecutor rushed in to record the confession and it was put in evidence at the trial. The Court found the confession was illegally obtained and unlawfully introduced on the trial.

"We hold that use of confessions extracted in such a manner from a lone defendant unprotected by counsel is not consistent with due process of law as required by our constitution." (347 U.S. at 561)

See also Blackburn v. Alabama, 361 U.S. 199; Ashcraft v. Tennessee, 322 U.S. 143; and the review in Malloy v. Hogan, 378 U.S. 1, at 7, of the recognition as early as 1897 in Bram v. United States, 168 U.S. 532, of the inadmissibility of involuntary confessions as a violation of

"that portion of the First Amendment to the Constitution of the United States commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' ... Under this test, the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary'. ... We have held inadmissible even a confession secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. Haynes v. Washington, 373 U.S. 503."

In the instant case, the record is clear that Fuller's confession was not the product of his free choice but was procured by the pressure applied by police officers and the prosecutor, who were experienced and sophisticated in methods of interrogation. Fuller resisted making any statement to the officers as long as he was able. But finally, his will was overborne and he confessed. There cannot be any question that the use of the illegally obtained confession at the trial influenced the outcome, for there wasn't any other evidence directly connecting Fuller with the crime. In any event, even if other evidence had existed, that would not have cured the violation of Fuller's constitutional rights. See Blackburn v. Alabama, 361 U.S. 199, at 206; Stroble v. California, 343 U.S. 181, at 190; Malinski v. New York, 324 U.S. 401, 404.

The admission of Fuller's involuntary confession was error of constitutional dimension and Fuller's Petition for a Writ of Habeas Corpus should be granted.

B. Fuller Did Not Waive His Constitutional Right Against Compulsion to Testify Against Himself Even Though His Trial Counsel Did Not Object To the Introduction of Fuller's Involuntary Confession

Fuller's right to relief is not barred by his trial lawyer's failure to object to the introduction of the confession. Fuller's trial lawyer believed (mistakenly) that the law

did not, at the time of the trial, permit the exclusion of Fuller's confession; trial counsel, therefore, did not investigate the facts or request a jury determination of voluntariness. There is no showing in the record that Fuller participated in the lawyer's decision (or omission) and Fuller cannot therefore be held to have waived his constitutional rights.

The technical forfeiture of state procedural remedies (i.e., the failure to make a formal objection at the trial stage) for the preservation of rights "does not legitimize the unconstitutional conduct by which his conviction was procured." Fay v. Noia, 372 U.S. 391 at 428. Fuller is entitled to relief from the denial of his constitutional rights unless there was an "intentional relinquishment or abandonment of a known right or privilege". Johnson v. Zerbst, 304 U.S. 458 at 464. Clearly there was no such relinquishment or abandonment by Fuller.

In Henry v. Mississippi, 379 U.S. 443, 451-452, the Supreme Court indicated that an appeal might be unsuccessful if on remand the Court determined that the trial lawyer purposely avoided objecting to questionable testimony. However, the Court suggested, even if an appeal were lost on that ground, a subsequent petition for a Writ of Habeas Corpus could still be successful if the petitioner showed that he had not participated in his lawyer's decision. In Brookhart v. Janis, 384 U.S. 1, the Supreme Court found the defendant did not intentionally and knowingly waive the Sixth Amendment right to cross-examination although his lawyer did. Defense counsel stated to the Court

that the defendant could be tried on a "prima facie case" meaning that the only evidence would be the prosecutor's case in chief. The defendant agreed to this strategy in open court and even appeared to understand its meaning (which, the Court found, was the equivalent of a guilty plea). The defendant also happened to say, however, that he was not pleading guilty. The Court, recognizing the presumption against waiver, said (384 U.S. at 7): "We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances."

In the instant case the record shows that Fuller did not himself knowingly waive any right. Trial counsel's decisions should not be held against Fuller, for he did not participate knowingly in those decisions.

In Fay v. Noia, 372 U.S. 291, Noia decided not to appeal his conviction although it was based solely on a coerced confession, as was the conviction in the instant case. The Court found that Noia justly feared that if he were retried, he might be sentenced to death. His two co-defendants were later released when their appeal on the grounds of coerced confessions succeeded. The same pressures to confess were applied to all three defendants. Noia then petitioned for a Writ of Habeas Corpus. Despite Noia's failure to appeal in the State judicial system, the Supreme Court granted the petition and ordered a new trial. The Court held that Noia's failure to appeal, though deliberate, was not an "intentional relinquishment or abandonment"

of his constitutional right not to be a witness against himself. The Court concluded (372 U.S. at 439):

"The classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464 -- 'an intentional relinquishment or abandonment of a known right or privilege' -- furnishes the controlling standard. ... At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. ... A choice made by counsel not participated in by the petitioner does not automatically bar relief."

In the instant case, Fuller did not make a "considered choice" to by-pass a challenge to the introduction of the illegal confession. His lawyer's failure to make such challenge cannot be attributed to Fuller, for on the record the lawyer's failure was at best an error of judgment.

Any "assumption" that there was a waiver would run counter to the exhortation in Fay v. Noia, 372 U.S. 391 at 439, not "to introduce legal fictions into federal habeas corpus". On the contrary, the Court should "'indulge every reasonable presumption against waiver' of fundamental constitutional rights [for] ... we 'do not presume acquiescence in the loss of fundamental rights.'" Johnson v. Zerbst, 304 U.S. 458 at 464.

As Fuller's involuntary confession was indispensable to the conviction, its admission was obviously not "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18.

POINT II

IF THE COURT DETERMINES THAT FULLER IS NOT ENTITLED TO DISCHARGE FROM CONVICTION, THE PETITION SHOULD BE REMANDED TO THE DISTRICT COURT AND COUNSEL ASSIGNED FOR A HEARING ON THE ISSUE OF THE VOLUNTARINESS OF FULLER'S CONFESSION

In the event the Court considers the record insufficient to substantiate Fuller's contention that his confession was involuntary, the Petition should be remanded to the District Court for a hearing on the issue. The District Court's summary denial of the Petition without a hearing was error, for Fuller's meritorious constitutional claim presents a question of fact, i.e., the voluntariness of his confession, and the question has not been tried before in any Court. See Harris v. Nelson, 394 U.S. 286, at 291; Townsend v. Sain, 372 U.S. 293; Walker v. Johnston, 312 U.S. 275, 286; Kott v. Green, 387 F.2d 136 (6th Cir.); and United States ex rel Wissenfeld v. Wilkins, 281 F.2d 707 (2d Cir.).

In Townsend, the Supreme Court announced the "appropriate standard" to determine when the District Court must hold an evidentiary hearing on a petition for a writ of habeas corpus. The Court held (372 U.S. at 312) that the standard

"is this: where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding."

Even prior to Townsend this Court had, in Wissenfeld, recognized the duty to hold an evidentiary hearing in circum-

stances such as those in the instant case (281 F.2d at 716):

"Relator has had no prior hearing either in the state or federal courts upon his claim. ... If the district court had rejected his present petition out of hand, entirely without a hearing, we would surely have reversed, for it is well settled that a prisoner is entitled to a hearing when his application raises a federal constitutional question the resolution of which turns upon issues of fact."

In the light of Townsend and Wissenfeld, it is clear that the District Court should not have relied on the transcript of the State habeas corpus hearing, for Fuller's State hearing was unfairly conducted and the claim that his confession was involuntary was not heard. Fuller was denied counsel in the State hearing and, therefore, he failed properly to allege or to prove his principal constitutional claim. Fuller's request for assigned counsel was not granted and the transcript of the hearing makes it plain that he was unable to represent himself. Moreover, the hearing judge, instead of protecting Fuller from the consequences of his evident inability to represent himself, took advantage of Fuller's lack of representation and permitted the State to offer hearsay testimony, to lead its only witness (the prosecutor at Fuller's trial) and to invite the witness to indulge in speculation and to make inferences with respect to matters not within his knowledge. The hearing judge did not himself examine the trial transcript or summon any witnesses who might have testified for Fuller, even though it was clear Fuller was not aware that they could or should be called.

Thus the Court should remand the instant Petition for a hearing, if the Court believes that the testimony of the police officers at the trial (where the issue of voluntariness was not tried) is insufficient to establish the involuntariness of Fuller's confession.

The District Court's failure to appoint counsel for Fuller in the light of his assertions made in open court at the State habeas corpus hearing that he was not competent to represent himself, also was error for it violated Fuller's Fourteenth Amendment right to due process of law. In Wade v. Mayo, 334 U.S. 672, the petitioner for a Writ of Habeas Corpus appealed from a denial of the Writ by the Fifth Circuit Court of Appeals. The Supreme Court reversed on the ground that the Petitioner should have had assigned counsel. The Court approved the District Court's finding that the failure to provide assigned counsel was "a denial of due process contrary to the Fourteenth Amendment of the Federal Constitution which renders void the judgment and commitment under which petitioner is held." 334 U.S. at 683. The Court explained (334 U.S. at 684):

"There are some individuals who, by reason of age, ignorance, or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment."

It has long been the practice in this Circuit to appoint counsel for an indigent habeas corpus petitioner where (as in the instant case) issues of fact must be resolved at a testimonial hearing to determine constitutional questions raised in the petition. In United States ex rel. Wissenfeld v. Wilkins, 281 F.2d 707 (2d Cir.), an appeal from the denial of a habeas corpus petition, the District Court had directed a hearing but denied the petitioner's request for assigned counsel. The Court did not call any witnesses to aid the petitioner, and petitioner's was the only testimony at the hearing. On appeal, the Court of Appeals for the Second Circuit held that the petitioner's Fourteenth Amendment rights had been violated and remanded the petition for a further hearing in the District Court. The Court held (281 F.2d at 715-716):

" . . . In certain circumstances the appointment of counsel to assist a prisoner in the presentation of his case is highly desirable [as W]here a petition for the writ presents a triable issue of fact . . . rarely will a prisoner have sufficient ability or training to recognize the facts which are important to his case or to present his side of the dispute in an orderly manner. 'Lack of [such] technical competence should not strangle consideration of a valid constitutional claim.' Brown v. Allen, 344 U.S. 443 at page 502.

"Upon some occasions, when complex factual data must be developed in order to support the prisoner's position, the assistance of counsel not only may be desirable but will be necessary if the prisoner's case is to be adequately presented. In such circumstances it may be reversible error for the district court to fail to appoint counsel to assist the applicant or to assure in other ways that the prisoner receives a fair and meaningful hearing

"A perfunctory inadequate hearing is hardly a greater recognition of the prisoner's rights than the failure to afford any hearing at all. We hold explicitly only what has always by implication been the law -- that the hearing afforded a prisoner must be a fair one considering all the circumstances, adequate in its procedures to allow a meaningful presentation of the prisoner's claims."

CONCLUSION

For the reasons outlined, namely the introduction in evidence of Fuller's involuntarily given confession, and the fruits of the confession, the Court should grant the Petition for a Writ of Habeas Corpus and discharge Fuller from conviction. In the alternative, the Court should hold that it was error for the District Court to deny the Petition without holding a hearing or assigning counsel and the Petition should be remanded to the District Court for a testimonial hearing on the voluntariness of Fuller's confession and for assignment of counsel to represent Fuller in the habeas corpus proceeding.

New York, New York
April 25, 1975

Respectfully submitted,

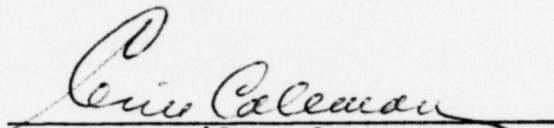
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AFFIDAVIT OF SERVICE BY MAIL

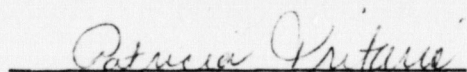
STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

Cecile Coleman, being duly sworn, deposes and says that she is not a party to the action, is over 18 years of age and resides at 43-10 Kissena Blvd., Flushing, N. Y. 11355.

On April 25, 1975, deponent served three copies of the Substituted Brief for Appellant upon Louis J. Lefkowitz, Attorney General of the State of New York, by David Birch, Assistant Attorney General, attorneys for Respondent in this action, at Department of Law, 2 World Trade Center, New York, New York 10047, the address designated by said attorneys for that purpose, by depositing true copies of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


Cecile Coleman

Sworn to before me this
25th day of April, 1975



PATRICIA TRITARIS
Notary Public, State of New York
No. 30-7283785
Qualified in Nassau County
Commission Expires March 30, 1978

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